Heritage Container, Inc. *and* Steel, Paper House, Chemical Drivers and Helpers Local 578, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–32412, 21–CA–32451, and 21–CA–32494

July 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On October 19, 1999, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief and limited exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

In *Levitz*, 333 NLRB 717 (2001), which issued subsequent to the judge's decision, the Board overruled *Celanese Corp*., 95 NLRB 664 (1951), and its progeny insofar as they permitted an employer to withdraw recognition from an incumbent union on the basis of a good-faith doubt of the union's continued majority status. The *Levitz* Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." Id. However, the Board also held that its analysis and conclusions in that case would only be applied prospectively; "all pending cases involving withdrawals of recognition [will be decided] under existing law: the 'good-faith uncertainty' standard as explicated by the Supreme Court" in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). Id. In addition, the Board stated in *Levitz* that its analysis was limited "to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions." Id. at fn. 1.[3]

Here, the judge found, and we agree, that the Respondent may not rely on the antiunion petition it received to withdraw recognition from the Union because the Respondent committed unfair labor practices that reasonably tended to contribute to employee disaffection from the Union. We also agree with the judge that even if the employee petition were not tainted by the Respondent's unremedied unfair labor practices, the Respondent still would not be legally entitled to withdraw recognition from the Union. In this connection, the judge found that the bargaining unit consisted of 69 employees, but only 24 unit employees signed the petition, 11 short of a majority. Such a showing is insufficient to establish a good-faith reasonable uncertainty as to the Union's continuing majority status. See *Levitz*, supra. For these reasons, we conclude, in agreement with the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Heritage Container, Inc., Riverside, California, its officers, agents, successors, and assigns, shall take the action set forth in the order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Make whole all unfair labor practice strikers to whom the Respondent failed to offer reinstatement upon their unconditional offer to return to work on January 13, 1998, for any loss of earnings which they may have suf-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel, in limited exceptions, sought, inter alia, the inclusion in the judge's recommended Order of the January 13, 1998 date, of the Union's unconditional offer on behalf of the strikers to return to work. We find merit in this exception and have revised the recommended Order accordingly.

[3] As Member Hurtgen stated in his concurring opinion in *Levitz*, supra, he does not embrace the new rule of that case. He agrees with his colleagues that pre-*Levitz* law should be applied in the instant case. Applying that law, he adopts the judge's finding that the Respondent could not rely on the December 12, 1997, employee petition to establish a good-faith uncertainty of the Union's majority status. In doing so, Member Hurtgen relies solely on the facts that: (1) the employees who signed the petition represented substantially less than a majority of the unit; (2) Respondent provided no evidence, other than the petition, of the Union's loss of majority support. Member Hurtgen finds that a petition signed by substantially less than a majority of employees, standing alone, is inadequate to support a good-faith uncertainty about a union's majority status. *Allentown Mack,* supra.

[4] In light of this conclusion, it is unnecessary to address the judge's alternative rationale that it was the Respondent's burden to establish its defense by "clear, cogent, and convincing" evidence and that the employee petition lacked probative value because the signatures had not been authenticated.

There are no exceptions to the judge's grant of an affirmative bargaining order to remedy the Respondent's unlawful withdrawal of recognition. We therefore find it unnecessary to pass on whether a specific justification for that remedy is warranted. Cf. *Raven Government Services,* 331 NLRB 651 (2000).

fered, in the manner set forth in the remedy section of this decision."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers who were not permanently replaced prior to conversion of the strike from an economic strike.

WE WILL NOT deal directly with striking employees.

WE WILL NOT threaten striking employees with job loss or offer them higher wages to return to work.

WE WILL NOT withdraw recognition from the Union in the absence of a good-faith bona fide doubt of the Union's majority status.

WE WILL NOT threaten to fire or actually fire a striking employee for being on strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer all employees engaged in the unfair labor practice strike who were not permanently replaced prior to December 6 or 7, 1997, and were not subsequently offered reinstatement by us, immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements hired on or after December 6 or 7, 1997.

WE WILL place the remaining former strikers who were not replaced prior to December 6 or 7, as well as those former strikers who were permanently replaced prior to December 6 or 7, 1997, for whom no employment is immediately available, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice and offer them employment before any other persons are hired or on the departure of any replacements hired before December 6 or 7, 1997.

WE WILL make whole all unfair labor practice strikers, who were not permanently replaced prior to December 6 or 7, 1997, and to whom we failed to offer reinstatement on their unconditional offer to return to work on January 13, 1998, for any loss of earnings which they may have suffered, with interest.

WE WILL, on request recognize and bargain with Steel, Paper House, Chemical Drivers and Helpers Local 578, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the unit employees and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

All production and maintenance employees employed by US at OUR facility located at 4777 Felspar Street, Riverside, California; excluding all office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

HERITAGE CONTAINER, INC.

Ariel Sotolongo, Esq., for the General Counsel.
Jack S. Sholkoff and *Adin Goldberg, Esqs. (Whitman, Breed, Abbott & Morgan),* of Los Angeles, California, for the Respondent.
Lourdes M. Garcia, Esq. (Wohlner, Kaplon, Phillips, Young & Barsh), of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California, on April 19–21, 1999,[1] pursuant to a consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on December 2, 1998, and which is based on charges filed by Steel, Paper House, Chemical Drivers and Helpers Local 578, International Brotherhood of Teamsters, AFL–CIO (the Union) on December 4 (21–CA–32412), December 18 (21–CA–32451), and on January 16, February 13, and October 1, 1998 (21–CA–32494), original, first amended, and second amended charge respectively. The complaint alleges that Heritage Container, Inc. (Respondent), has engaged in certain violations of Section 8(a)(1)(3) and (5) of the National Labor Relations Act (the Act).

Issues

I. Whether Respondent acting through its supervisor, bypassed the Union, the collective-bargaining representative, and dealt directly with employees then engaged in an economic strike, with respect to mandatory subjects of negotiations.

II. If so, whether the strike was subsequently converted to an unfair labor practice strike.

[1] All dates refer to 1997 unless otherwise indicated.

III. Whether Respondent unlawfully withdrew recognition from the Union.

IV. Whether the Union made an unconditional offer, for striking employees to return to their former positions of employment, and if so, whether Respondent has failed and refused to reinstate the employees to their former positions of employment.

V. Whether Respondent, through its supervisors, has engaged in certain unlawful acts such as interrogations, threats, and promises of benefits.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the business of manufacturing craft corrugated containers and having a facility located in Riverside, California. It further admits that during the past year ending December 31, in the course and conduct of its business it has sold and shipped goods valued in excess of $50,000 to other enterprises located within the State of California, each of which other enterprises, during the same period of time, sold and shipped from its California locations, goods valued in excess of $50,000 direct to points outside the State of California, or purchased or received at its California locations, goods valued in excess of $50,000 directly from points outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admitted at the hearing, and I find, that Steel, Paper House, Chemical Drivers and Helpers Local 578, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act (Tr. 58).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background/undisputed facts

On or about July 7, 1995, the Union was certified as the exclusive collective-bargaining representative of a unit of Respondent's employees described as follows:

> All production and maintenance employees employed by Respondent at its facility located at 4777 Felspar Street, Riverside, California; excluding all office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

Shortly after the Union was certified, the parties began negotiations to reach a collective-bargaining agreement. The Union was represented in negotiations by Lawrence Casey, a business representative and the General Counsel's witness. He in turn was assisted at different times by one or more other union officials and an advisory bargaining committee of Respondent's employees: Juan Almaraz (witness for the General Counsel), Reynaldo Ayala, Martin Bermejo, Moises Michel, and later on, Carlos Cervantes (replacement for Ayala). At the end of the first year of bargaining, without a contract, the Union requested the assistance of a Federal mediator. The mediator assisted the parties for approximately 1 more year, but still no contract resulted.

As a strike became a possibility, Richard Gabriel, Respondent's president and owner, prepared a document which he circulated to employees with their paychecks. The document reads as follows:[2]

> TO: All Employees
> FROM: Richard Gabriel
> DATE: October 14, 1997
> SUBJECT: Company Matters
>
> Many of you know that Heritage Management has made a final offer to Local 578. We think this is more than a fair offer. Ultimately, you can be the judge of that.
>
> We understand that in considering whether to approve and accept this offer, Local 578 may ask you to authorize a strike against Heritage. We certainly are not predicting whether a strike will take place; ultimately, it is not in our hands in any way. However, there are some things you should know that could affect you directly if you were to go on strike. We want you to be aware of these facts.
>
> *While on Strike*:
>
> 1. You do not get paid;
> 2. Your insurance and other related benefits could be canceled;
> 3. You could be permanently replaced in your job;
>
> —as such you could go on a preferential hiring list, available for only those jobs which later became open, if any;
>
> 4. You would not be eligible for unemployment benefits or other assistance.
>
> *Also*, you should know that:
>
> 5. You are not required to vote in favor of a strike;
> 6. You have the right to cross a picket line to go to work during a strike;
> 7. The Company has an absolute right to operate and fully continue in business during a strike.
>
> We hope that you keep these rights and facts in mind when making these decisions. [R Exh. 2.]

Notwithstanding Respondent's memo above, in late October or November, employees voted to reject Respondent's last, best, and final offer and to authorize a strike.

An economic strike began on December 2 with a majority of Respondent's 55 unit employees vowing to remain out until Respondent agreed to a collective-bargaining agreement. Two

[2] Although Respondent's work force is all or mostly Spanish-speaking, the document apparently was never translated into Spanish.

shifts of pickets began walking at Respondent's premises with signs stating "On Strike Against Heritage Container, Teamsters, L. 578."

Approximately 10–15 of Respondent's unit employees did not join the strike. Respondent temporarily suspended its night shift, began hiring permanent replacements and continued scaled-back operations. After about 3 weeks, only 15 strikers were left.

2. Background/disputed facts

The General Counsel called four bargaining unit employees who testified that they had been called or contacted during the strike by a company supervisor named Jaime Michel, who was also called by the General Counsel as an adverse witness.

a.

The first witness, Francisco (Poncho) Villa, is now a night-shift supervisor and has been so employed for about 1 year. On the evening of December 3, the second day of the strike, Villa, then a striker, received a phone call from Michel, then a day-shift supervisor. Villa gave two versions of the conversation. At hearing, he testified that Michel said that if he wanted to return to work, a position was available and he was needed. When Villa expressed reluctance to return until the strike was over, Michel added if he didn't return he would be replaced. Villa denied that Michel promised him a raise to return to work.

Like others who were called by Michel, Villa reported the remarks to Casey and within a day or so, wrote on a document a somewhat different version of Michel's call: "I received a phone call from Mr. Michel on 12/4/97, and he told me that if I did not work I would be fired and if I worked, I would get a good raise and not to tell anybody" (Tr. 151; GC Exh. 8). At the hearing, Villa claimed that he wrote the statement because of what others had written, not because it was true. I don't believe Villa as to his disavowal of his statement. To the extent his testimony differs from his written statement, I credit his written statement which was more recent and more consistent with other witnesses and written before Villa had a motive to shade his testimony to protect his employer.

A second striker called was Oscar Paizano who expressed his reluctance to be a witness because he "didn't want to have problems with the company. [The witness] is happy with them [and he] hasn't had any problems since [he] went back to them and [they—witness and company] have understood each other very well." (Tr. 170.) Like Paizano, I also understand how the world works, and I credit his written statement to the extent it differs from his testimony at hearing. First, the testimony, Paizano was called by Michel on the evening of December 3 and was told that if he returned to work, he would be given "things," and that the strikers had quit. If he didn't return, Michel said, Paizano would be replaced. Like the prior witness, Paizano expressed reluctance to return while his coworkers were still on strike. Michel concluded by saying he was only calling those who the boss thought were on his side. Two weeks after Paizano returned to work, he was given a raise in pay.

On December 4, Paizano wrote "nobody forced me to write this. [Michel] called me yesterday, Wednesday, December 3 and told me that if I went back to work he would pay me what I wanted, that only he would call the ones that the owner thought were okay. And that . . . all the ones that were outside they had already quit since they went on strike. But if I wanted to go back, that I was going to be given many things" (Tr. 177–178; GC Exh. 8).

A third striker named Gerardo Buenrostro testified that he too was called by Michel about 8 p.m. on December 3 and was asked, Mr. Richards (referring to owner Richard Gabriel, witness for Respondent) says, do you want to work. The witness asked if his coworkers were included but Michel said no, he was only calling Buenrostro. Michel added that Richard said that if I went back to work he was going to give me a good raise, but if he didn't go back, the witness would lose his job. Michel concluded by telling Buenrostro not to tell anyone they had talked. Buenrostro promised to think it over.

Buenrostro did not write a statement out about the call from Michel. However, now that he was back to work, and having received two significant hourly pay raises since returning ($1.15 plus $.50 later), Buenrostro seemed determined to attempt to please everyone with his testimony. For example, on cross-examination, the witness reiterated that Michel had said he would lose his job if he didn't go back; Michel said "fired, terminated" (Tr. 197). Later in cross-examination, the same question was asked about what Michel had said. This time Buenrostro caught the ball from company counsel, and as if by magic, Michel now told the witness he would be "replaced" if he didn't return to work (Tr. 201). Undaunted, the General Counsel decided that he too should attempt a feat of magic: Q. ". . . Did [Michel] use the word fire or terminated or did he use the word replace?" A. "I think he said I was just going to loose my job, I don't remember exactly, the word" (Tr. 204). Since the lawyers had waded into this issue, it was only fair that I too should have a crack at the witness. Q. ". . . did Michel say if you did not come back to work, you would be fired or terminated or did he say if you do not come back to work you will be replaced?" A. He said I was going to be fired or replaced, loose my job" (Tr. 208). Buenrostro was not successful in pleasing everyone and he certainly didn't please himself; I find that Michel told him, if he didn't come back he'd be fired, or would loose his job, just as he told the two prior witnesses.

After Buenrostro reported the call to Casey as the others had done, Casey asked him to go with Juan Almaraz,[3] also a striker and Michel's brother-in-law and call Michel at a public phone to find out what was going on. Almaraz reached Michel by phone on December 3 and asked him if he had called Buenrostro and Michel said he had. Almaraz asked him why he had done that and Michel explained to his brother-in-law that he was calling because Richard [Gabriel] told him to call the guys. When Almaraz asked who Michel had called, Michel answered

[3] Almaraz had more fluency with English than the other strikers. While the General Counsel's other striker witnesses testified through the interpreter, Almaraz attempted to testify without the interpreter. As matters turned out, he would require the services of the interpreter from time to time during his testimony. In any event, he would frequently interpret himself for Casey during the strike. Almaraz appeared to be viewed by other strikers as a leader and liaison to English-speaking union officials.

that he had called Rene Claros, Ismael Alvarez, Samuel Chaves, Onofre Salvatierra, and Francisco Villa (of this group, only Villa testified). Almaraz concluded by telling Michel that it was wrong for him to be calling strikers with the message in question and Michel promised not to do it anymore.

Within 1–2 days after Almaraz made the phone call to Michel, Michel was driving out of work through the picket line when he called to Almaraz, "Brother-in-law, what are you doing, you got family and you are loosing money. I don't want you to loose everything." Then Michel assured Almaraz that he was telling him this "as a friend and not for the company."

The General Counsel called Michel as an adverse witness before calling the four strikers referred to above. Michel's testimony began falsely and continued in that vein. His testimony was preposterous and fantastic; I believed hardly a word of it. Michel is and was a statutory supervisor for all times material to this case. He has worked for Respondent for about 10 years. First, Michel denied initiating any calls to strikers, but said that several had called him. To the extent he made calls during the strike, he was supposedly only returning calls placed to his home when he wasn't there and responding to the messages left with his wife. This was false testimony as Villa, Paizano, and Buenrostro all testified they had never called Michel at that time. Continuing his deception, Michel testified the calls all related to questions about how the strikers could get their paychecks or procedures for crossing the picket line to return to work early or questions regarding vacation time. Not a single witness was called by Respondent to corroborate Michel regarding these supposed calls to Michel's home. Michel was never called back as Respondent's witness to address the phone conversation with his brother-in-law Almaraz, as Buenrostro listened to Almaraz' side of the conversation.

b.

Once Casey had received reports regarding Michel's phone calls, he contacted union attorneys who immediately filed an unfair labor practice (ULP) charge against Respondent. Then on December 6 or 7, Casey convened an ad hoc meeting of all strikers present on the picket line about 3:30 p.m. (This time was chosen to involve the maximum number of pickets from the first shift just finishing and the second shift just beginning.) About 35 to 50 pickets were present to hear Casey who addressed them from the back of a pickup truck. Speaking in English with Almaraz translating, Casey explained what Michel had done—to those few who by then were not aware of his phone calls to strikers—and recommended that the strikers vote to change the status of the strike to ULP strike, since it was illegal, according to Casey, to try to convince strikers to return to work, without going through the Union, the certified bargaining representative. Casey added that union attorneys had already filed charges with the NLRB. A few questions were raised such as whether ULP strikers could still collect strike benefits, answer, yes. Other questions dealt with the meaning of a ULP strike and Casey explained that it was to strikers' advantage, as they couldn't arbitrarily be replaced. Strikers voted for a conversion to ULP strike by raising their hands. All but two did and they merely abstained but did not vote against the ULP strike.[4]

After this vote, all picket signs were changed to read, "Heritage Container, Unfair to Teamsters L. 578." Then on December 9, the Union sent a letter to the employer which reads as follows:

> Mr. Richard Gabriel
> President
> Heritage Container
> 4777 Felspar Street
> Mira Loma, Ca. 91752
>
> Dear Mr. Gabriel:
>
> This is to advise you that Teamsters Local 578 has converted the current economic strike to an unfair labor practice strike as a result of the numerous unfair labor practices recently committed by Heritage Container, Inc.
>
> As you are well aware, employees on strike may not be permanently replaced by employees hired to replace them during the pendency of an unfair labor practice strike.
>
> Sincerely,
>
> /s/ Lawrence Casey
> Lawrence Casey
> Business Agent
> [GC Exh. 3.]

As matters turned out, Respondent ignored the Union's letter because on December 31, it claimed to have received objective evidence which caused it to have a bona fide doubt of the Union's majority status. The nature of this evidence and the issues surrounding it will be discussed below.

B. Analysis and Conclusions

1. Alleged ULP committed by Michel

Respondent's answer admits that Michel is a statutory supervisor and I find that for all times material to this case Michel functioned in that capacity. It is well settled that a 2(11) supervisor of an employer is a 2(13) agent of that employer. *Excel DPM of Arkansas, Inc.,* 324 NLRB 880 fn. 2 (1997). Because Michel is Respondent's agent, Michel's acts and statements are imputable to Respondent; that is, Respondent is responsible for them. *Atlas Minerals*, 256 NLRB 91, 96 (1981). In his statements to employees over the phone, Michel claimed in some cases, to be acting under specific orders of Richard Gabriel; both Gabriel and his son Thomas Gabriel denied that was the case. I need not decide whether the Gabriels or their supervisor is telling the truth. Respondent is responsible for what he did, regardless.

[4] Almaraz also testified about a second meeting at the home of a striker in January 1998, the subject of which supposedly was the conversion of the strike to a ULP strike. Since by this time, the strikers had already voted about a month before, the picket signs had been changed and notices had been sent to Respondent, I don't know what to make of this alleged second meeting; however, even if it occurred, it was merely duplicative of the picket line meeting and did not impact any issue in this case.

I have already recited in detail what Michel did. By calling strikers and soliciting them to return to work using both promises of more money and threats of job loss, Michel, as agent for Respondent, engaged in a bypass of the Union and direct dealing with bargaining unit employees. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act. *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1150 (1997); and *Gloversville Embossing Corp.*, 297 NLRB 182, 187–190 (1989). See also *Naperville Ready Mix, Inc.*, 329 NLRB 174, 184 (1999). Compare *SCA Services of Georgia,* 275 NLRB 830, 836 (1985).

I also agree with General Counsel (Br. 13), that Michel's statement to strikes that they would loose their jobs if they did not return to work and by Michel referring to those on the picket line as employees who had already lost their jobs, Respondent violated Section 8(a)(1). In *Gloversville Embossing Corp.*, supra, the Board explained,

> Although an employer may permanently replace economic strikers, it cannot terminate the employment relationship because of the strikers' protected activities. . . . the unlawful discharge of strikers is "a blow to the very heart of the collective bargaining process" and "leads inexorably to the prolongation of a dispute." [Citation omitted.]

In this case, it appears that Richard Gabriel approved of Michel's statements; consider Gabriel's testimony; Q. (Judge). . . "your position . . . is that [Almaraz] quit?" A. "He walked off the job. That's my position." Q. On the strike you mean?" A. Yes . . . what I know from my position is that when someone walks off the job, they have surrendered their position" (Tr. 348). See *Vanguard Tours*, 300 NLRB 250, 254 (1990) (respondent violated Section 8(a)(1) by effectively discharging some strikers by telling them they were considered to have quit).

The misinformation/disinformation conveyed to strikers by Michel misstated strikers' *Laidlaw*[5] rights and violated Section 8(a)(1) of the Act. See *Gibson Greetings,* 310 NLRB 1286, 1287 (1993), enf. denied 53 F.3d 385 (D.C. Cir. 1995).

2. Alleged conversion of economic strike to ULP strike

In *Developing Labor Law* (3d ed. vol. 2 1992), pp. 1102–1103, the author states the applicable principles of law:

> A strike which is economic at its inception may be converted into an unfair labor practice strike by an employer's subsequent commission of unfair labor practices. Statements made by the employer to its striking employees regarding their replacement or reinstatement may provide the unfair labor practices which later become determinative as to whether the employees are unfair labor practice or economic strikers and whether they are entitled to reinstatement. Strikers may also be entitled to reinstatement as unfair labor practice strikers if the employer commits unfair labor practices that have the effect of prolonging an economic strike. However, there must be a causal connection between the unfair labor practice and the prolongation of the strike. [Citations omitted.]

The legal authorities dealing with the issue pending place the burden squarely on the General Counsel to prove that Respondent's ULP which I found above, aggravated or prolonged the strike. *NLRB v. Champ Corp.*, 933 F.2d 688 (9th Cir. 1990). However, the General Counsel must prove only that "the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused a prolongation of the work stoppage." *F. L. Thorpe & Co.*, 315 NLRB 147, 149 (1994). In consideration of all surrounding facts and circumstances, I find that the General Counsel has met his burden in this case and that the strike was converted to a ULP strike on or about December 6 or 7, the date of the meeting on the picket line to vote for conversion. To sum up, I have found a ULP and that it was duly reported to Casey, a union agent. I have also found that employees duly voted on the picket line to convert the strike to a ULP strike. Notice was sent to Respondent regarding the change in status of the strike (GC Exh. 3). Picket signs were changed to reflect the conversion of the strike. See *Page Litho*, 311 NLRB 881, 891 (1993); and *R & H Coal Co.*, 309 NLRB 28 (1992), enfd. 16 F.3d 410 (4th Cir. 1994). I also find the requisite causal connection between the ULP and the prolongation of the strike.

In analyzing the various factors, I have been cognizant of the Board's admonition in *C-Line Express*, 292 NLRB 638 (1989), enf. denied 873 F.2d 1150 (8th Cir. 1989), taken from *Soule Glass Co. v. NLRB*, 652 F.2d 1055 at 1086 (1st Cir. 1980), that both the Board and the courts "must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual content." With all due respect to Casey, he did not impress me as so sophisticated (consider Casey addressing strikers on the picket line from the back of a pickup truck while a striker translates his remarks into Spanish) as to be disingenuous regarding the conversion of the strike.

Both objective and subjective factors may be probative of conversion, ... *NLRB v. Harding Glass Co.*, 80 F.3d 7 (1st Cir. 1996), citing *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 840 (5th Cir. 1978). At page 113 of the transcript, Michel testified that he contacted 10–12 strikers. I agree with the General Counsel (Br. 13, fn. 26), that he called several strikers with the same promises and threats as related by Villa, Paizano, and Buenrostro. The evidence shows that each person called repeated that fact to others on the picket line, until all or most who had been called became aware of the others in the same category. I find that knowledge of Michel's calls and the reasonable belief amongst strikers that he was speaking for Richard Gabriel caused substantial consternation among the strikers, as they believed their jobs were in jeopardy. Of course, this belief is more reasonable in the context of Respondent's hiring of permanent strike replacements beginning on day 1 of the strike. Thus, I find no self-serving after the fact evidence to which the Board accords little weight. See *F. L. Thorpe*, supra at 150.

As to objective factors, Michel's statements are similar to those found in *F. L. Thorpe* and described by the Board as having a reasonable tendency to prolong the strike and therefore

[5] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

afford a sufficient and independent basis for finding a conversion. Id. p. 149. See also *Gloversville Embossing Corp.*, supra (letters to strikers from employer saying they would be terminated if they refused to abandon strike caused conversion to ULP strike).

3. Alleged unfair withdrawal of recognition

a.

On December 31, Respondent sent a letter to Casey which reads as follows:

> Lawrence Casey
> Business Representative
> Teamsters Local 578
> 1616 West 9th St. Suite 206
> Los Angeles, CA 90015
>
> Dear Sir,
>
> This letter is to notify you that Heritage Container has received objective written evidence that Teamsters Union Local 578 no longer represents the majority of Heritage Container employees.
>
> Yours truly,
>
> /s/ Richard J. Gabriel
> Richard J. Gabriel
> President
> [GC Ex. 5.]

The letter was based on a petition allegedly signed by a number of Respondent's employees, the heading of which reads as follows:

> 12/12/97
>
> As a vote of confidence in Heritage Container employees have decided that they do not want the Teamsters Union, Local #578 to be their bargaining agent any more.

Following this heading, 56 signatures were affixed to the petition (R. Exh. 1).

According to Respondent's witness Richard Gabriel, he arrived at work on December 31 and found the petition on his desk, without explanation. After asking legal counsel for advice, R. Gabriel turned the document over to an employee, "Orlando in Accounting," who did not testify at hearing. According to R. Gabriel, Orlando verified that all persons whose signatures were allegedly on the petition were current employees. However, Orlando did not nor did anyone else ever authenticate the signatures as being genuine. No alleged signers of the petition ever testified. In a check of the signatures by attorneys for the parties during hearing, no record of employment were found for person #56, Alfonso Briones. In light of this apparent error by "Orlando in Accounting," the parties agreed that the petition should contain only 55 names.

b.

In general, a union is entitled to an "irrebutable presumption of majority status for the first year following its certification by the Board. Thereafter, the presumption of majority status becomes rebuttable. In order to rebut the presumption and withdraw recognition an employer may act based upon either an affirmative showing that the union lacked majority support at the time of withdrawal; or that it had a good-faith belief, founded on a sufficient objective basis, that the union no longer represented a majority of the employees. This good-faith belief must be supported by objective considerations, which are clear, cogent, and convincing. *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281 (6th Cir. 1999); and R*ock-Tenn Co. v. NLRB*, 69 F.3d 64 (7th Cir. 1995).

In *Allentown Mack Sales & Service. v. NLRB*, 522 U.S. 359 (1998), the Court upheld use of the identical good-faith standard for both polling and withdrawal of recognition. In doing so, the Court characterized a good-faith doubt as "a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees."[6] In addition, the Court stated that employee statements of dissatisfaction with the quality of union representation are relevant to determining the existence of a good-faith doubt. The Court held that evidence of a good-faith doubt might be provided by "probative, circumstantial evidence."

c.

I begin by questioning the probative value of the petition itself. None of the signatures were authenticated. The employee Orlando who told Gabriel that all 56 signatures represented names of employees made at least one error. Who circulated the petition, when and under what conditions? None of these questions have been addressed in the record. Yet, the General Counsel glosses over these significant issues, contending in its brief, page 16, that the central issue is "that most of the signatures on such petition were invalid to establish a majority, inasmuch as such individuals were temporary strike replacements of unfair labor practice strikers." At the hearing, the General Counsel had no objection to the petition being received into evidence (Tr. 379). With all due respect to the General Counsel, his apparent concession on the threshold issue of whether the petition is valid (see e.g. Br. 17 reference "to those employees who signed the petition" (R. Exh. 2)) is not binding on me. I find initially that the petition does not meet the clear, cogent, and convincing standard of proof referred to above and Respondent has therefore failed to carry its burden of proof.[7]

In addition to the petition lacking probative value, I note still another hurdle which Respondent has not cleared. A good-faith doubt as to the Union's continuing majority status can arise only in a context free of the coercive effect of unfair labor practices. Therefore, an employer cannot lawfully withdraw recognition form a union if it has committed as yet unremedied unfair labor practices that reasonably tended to contribute to employee disaffection from the union. *V & S ProGalv, Inc. v. NLRB*, supra, 168 F.3d at 281, citing *Columbia Portland Ce-*

[6] *Allentown Mack,* supra. See also, *Henry Bierce Co.*, 328 NLRB 646, 650–651 (1999).

[7] Put another way, as part of meeting its burden of proof, Respondent had a duty before it withdrew recognition from the Union, to ascertain whether the supposed signatures on the petition represented the uncoerced views of a majority its unit employees. Cf. *Rock-Tenn Co. v. NLRB*, supra. At Br. 22–23, Respondent mistakenly attempts to shift this burden to the General Counsel.

ment Co. v. NLRB, 979 NLRB 460, 464 (6th Cir. 1992); and *Detroit Edison Co.*, 310 NLRB 564 (1993) (direct dealing ULP precludes withdrawal of recognition). See also *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996).[8]

A petition signed by at least half of a bargaining unit's members in which they indicate that they do not wish to be represented by the union ordinarily constitutes sufficient objective evidence to rebut the union's presumed majority status. *NLRB v. D & D Enterprises,* 125 F.3d 200 (4th Cir. 1997) (citations omitted). When the General Counsel attempts to rebut an employer's alleged good-faith belief of lack of majority union support, a multifactored analysis must be under taken to determine the validity of the employer's belief. Id. at 209 citing *Master Slack Corp.*, 271 NLRB 78 (1984). The factors include (1) the length of time between the ULP and the petition (about 3 weeks); (2) the nature of the employer's illegal acts (coercion of strikers to return to work by promises of benefits and threats of job loss); (3) any possible tendency to cause employees disaffection from the Union (employees were led to believe that a union-sponsored economic strike could result in permanent job loss which clearly would encourage employees loss of faith in and disaffection from the union); and (4) the effect of the unlawful conduct on employee morale, organizational activities and membership in the Union (unit employees were unsophisticated Spanish-speaking employees who returned to work in large numbers before the strike was over in part due to Respondent's ULP; the strike was negatively affected as were the original economic objectives). Based on the above analysis, and without respect to the petition's other defects, I find that there was a causal relationship between Respondent's ULP and the petition received by Respondent on December 31. Respondent may not therefore rely on the petition to establish a good-faith doubt of the Union's majority status. *Vincent Industrial Plastics,* 328 NLRB 300, 301–302 (1999); *Wire Products Mfg. Corp.*, 326 NLRB 625 fn. 14 (1998).

Notwithstanding my conclusions above, I turn now to assess whether there is a proper majority of signatures on the petition to permit Respondent to withdraw recognition from the Union, i.e., to rebut the presumption of continuing majority support. For purpose of the following discussion, I will assume for the sake of argument that the signatures on the petition were authenticated and that the ULP found above was not sufficient to preclude a good-faith belief that the Union lacked majority support.

As Respondent urges me to do (Br. 23), I begin with the size of the prestrike bargaining unit—55 employees.

The number of permanent replacement between December 2 through December 29—47 employees.

Of the 55 employees who signed the petition, number of employees who worked for the Company prior to December 2—10 employees.

At page 23 of its brief, Respondent computes the relevant bargaining unit as 102 employees (55 employees in the prestrike unit plus 47 permanent replacements). This computation is based on an assumption that the strike remained an economic strike, an assumption not supported by the evidence. Accordingly, an alternative analysis must be used. At page 17 of his brief, the General Counsel contends that replaced former economic strikers were eligible to vote in an election conducted within a 12-month period following commencement of the strike. To this group, I add strike replacements (prior to conversion of the strike) and nonstrikers. *Tractor Supply Co.*, 235 NLRB 269 (1978).

The General Counsel marks the conversion of the strike on December 3; I found above the correct date to be December 6 or 7. This difference of opinion results in only two additional replacements (#13 and #15 on petition) added to the 12 employees counted at footnote 31, page 17 of the General Counsel's brief. Thus, the valid bargaining unit is 69 employees and Respondent would need at least 35 valid signatures on the petition. The General Counsel mistakenly claims to his prejudice that 13 members of the original bargaining unit signed the petition; however, the parties stipulated at hearing that 10 of the people who signed the petition were employees of the Company prior to December 2 (Tr. 297). Thus, 10 prestrike signers added to 14 permanent replacements results in 24 signers, 11 short of a valid majority. For this and for all the reasons discussed above, I find that Respondent was not legally entitled to withdraw recognition from the Union and in doing so, violated Section 8(a)(1) and (5) of the Act.[9]

4. Respondent's alleged refusal to reinstate all ULP strikers

On January 12, 1998, Casey faxed a letter to Respondent on behalf of the [ULP] strikers, unconditionally offering to return to work on January 13, 1998 (GC Exhs. 7(a), (b)). An employer has no duty to reinstate strikers unless and until an unconditional offer to return to work from the strike is made. *McAllister Bros.*, 312 NLRB 1121, 1123 (1993); *Clow Water Systems Co. v. NLRB*, 92 F.3d 441, 442 (6th Cir. 1996).

Respondent did not reply to the Union's letter unconditionally offering to return to work. Instead, apparently relying on its theories that the strikers were economic strikers and that it had properly withdrawn recognition from the Union, it treated the strikers as returning economic strikers and placed those who it contended had been permanently replaced on a preferential hiring list (R. Br. 24).

As recently stated by the administrative law judge in *Detroit Newspapers*. 326 NLRB 782, 784 (1998).

[8] At Br. 23, Respondent refers to the absence of any allegation in the complaint alleging taint of the petition. In response, I note that Respondent was on notice of the General Counsel's claim that its ULP converted the strike. The very same ULP tainted the petition on which Respondent purported to rely. This issue, as well as the issue regarding the unauthenticated signatures on the petition were fully litigated at hearing. Accordingly, it is entirely proper to make findings on both, without prejudice to Respondent. *Mine Workers District 29*, 308 NLRB 1155, 1156 (1992); *NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82, 87–88 (2d Cir. 1987).

[9] At p. 18, fn. 34 of its brief, the General Counsel explains the presence of a brief from *Chelsea Industries*, Case 7–CA–36846 appended to his brief for the present case. I express no opinion on whether *Celanese Corp. of America*, 95 NLRB 664 (1951), should be overruled, the issue in *Chelsea Industries*, as I lack the authority to instruct the Board on its duty.

> Unfair labor practice strikers are entitled to reinstatement upon their unconditional offer to return to work, displacing, if necessary, any replacements hired during the strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). An employer violate[d] Section 8(a)(3) and (1) of the Act by failing to offer reinstatement to unfair labor practice strikers who have made an unconditional offer to return to work. *Cal Spas*, 322 NLRB 41 (1996). In order to permit an orderly return to work, the Board affords an employer a 5-day period in which to return the former strikers to work without incurring a backpay obligation. However, [when] that 5-day grace period is ignored, then backpay obligations begin from the date of the unconditional offer to return to work. *La Corte ECM, Inc.*, 322 NLRB 137 (1996).

Based on the above, I find that Respondent has violated Section 8(a)(3) and (1) of the Act by failing to offer reinstatement to ULP strikers who have made an unconditional offer to return to work.[10]

In conclusion, I find that Respondent's individual offers of reinstatement to certain former strikers were invalid. As the Board stated in *Orit Corp.*, 294 NLRB 695 fn. 3 (1989), respondent never made a valid offer of reinstatement because it failed to respond to the union and instead notified a limited number of individual employees directly as to the circumstances of their return (piecemeal reinstatement). Because the reinstatement offers are invalid, Respondent was not entitled to treat nonreturning employees as having abandoned their employment. An employee does not waive reinstatement by failing to respond to an inadequate offer. *Orit Corp.*, supra, at 699.[11]

5. Respondent's alleged coercive statements

The General Counsel refers to three instances where Respondent violated the Act by coercive statements to Almaraz (Br. 11–12, 21).

a.

In early September, Tom Gabriel is alleged to have called Almaraz into his office twice and to tell him that his father Richard Gabriel would never allow the Union in, would rather close the plant and die than allow the Union to take over. T. Gabriel also allegedly said that Almaraz could become a supervisor and make more money, but that he needed to persuade his coworkers to get rid of the Union. In his testimony, T. Gabriel denied making the remarks in question.

For several reasons, I do not credit Almaraz and will recommend this allegation be dismissed. First, I note that Almaraz was a member of the employee advisory committee during negotiations. After the alleged remarks of T. Gabriel in September, there was at least one additional bargaining session (Tr. 59). There is no evidence that Almaraz reported the alleged remarks to Casey, to the Federal mediator, or to anyone else. Given the 2 years bargaining history and Almaraz' experiences on the employee advisory committee, I would have expected him to report these coercive remarks, just as employees had no trouble reporting Michel's telephone calls to Casey. Next, I cannot fathom why T. Gabriel would have made these remarks, since the Union was already in the company and T. Gabriel would have risked an embarrassing incident during the final session of bargaining if Almaraz had referred to the remarks. Moreover, Gabriel knew the Union would have placed blame for the strike squarely on him if his remarks had been reported. Finally, with these doubts and a lingering fear that Almaraz's English was not as good as he believed, I simply am unable to credit Almaraz on this point.

b.

A second statement in question concerns Almaraz's testimony that on January 17, 1998, he encountered Tom Gabriel outside the company and Gabriel said that he was fired because people like you hurt the company; he then asked Almaraz to turn in his uniforms which Almaraz did the next day, receiving his personal tool box and last check in exchange. T. Gabriel denied having the conversation in question, but consider his exact testimony on direct examination:

> Q. . . . did you have a conversation with Mr. Almaraz where you asked him to bring his uniforms back?
> A. Me personally?
> Q. Yes.
> A. No.
> Q. Do you know anybody else in your company who did?
> A. I couldn't say for sure.
> Q. . . . did be bring his uniforms and pick up his tools?
> A. . . . Yes he did return his uniforms. And yes he did [pick up] his tools.
> . . . .
> Q. Do you know if anybody asked Mr. Almaraz to bring his uniforms back.
> A. I couldn't say.
> [Tr. 312–313.]

In this case I credit Almaraz since I can imagine no circumstances where he would voluntarily turn in his uniforms and receive his final check and tool box. Threats to fire strikers or firing strikers in fact violate Section 8(a)(1) of the Act and I so find here. *B. N. Beard Co.*, 248 NLRB 198, 208 (1980); *Super Glass Corp.*, 314 NLRB 596 fn. 1 (1994); and citing *Abilities & Goodwell*, 241 NLRB 27 (1979).

c.

In March 1998, Jaime Michel and his wife and their four children came to Almaraz's home on a Sunday for a barbecue. Michel visited often there since he is Almaraz' brother-in-law.

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[10] There is no issue before me regarding any claim by Respondent that it had a legitimate and substantial business justification for refusing to discharge permanent replacements. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Hotel Roanoke*, 293 NLRB 182, 185 (1989); and *NLRB v. Champ*, 933 F.2d 688, 697 (9th Cir. 1990).

[11] In light of my findings and conclusions, it is unnecessary to consider separately the discriminatees alleged in the complaint: Juan Almaraz, Reynaldo Ayala, Martin Bermejo, Carlos Cervantes, and Moiess Michel. However, I note that Respondent's argument (Br. 25), that some or all of these discriminatees obtained alternative employment and abandoned the strike is without merit. See *Oregon Steel Mills*, 300 NLRB 817, 820–824 (1990), and *Lone Star Industries*, 279 NLRB 550, 553–554 (1986), affd. in part 813 F.2d 472 (D.C. Cir. 1987).

At some point while the two wives were cooking dinner, the two men were alone on the backporch, and Michel asked Almaraz what he was going to do now. (Apparently a reference to his termination.) Almaraz explained that he would look for work elsewhere and Michel said, "I might be able to help you, maybe I can talk to Mr. Richard or Tom Gabriel, but they hate you guys. They don't like you. . . . You are troublemakers for the company" (Tr. 236).

I will recommend this allegation be dismissed. Almaraz was an open union supporter visiting his brother-in-law for a Sunday dinner when statements were made by Michel in the context of Michel offering to help Almaraz obtain reinstatement. Almaraz knew how the Gabriels felt about him. I ask, where's the coercion, or to use the popular jargon of the day, Where's the Beef? I find none here.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (5) of the Act by its supervisor Jaime Michel directly dealing with striking employees and by Respondent withdrawing recognition from the Union.
4. Respondent violated Section 8(a)(1) of the Act by its Supervisor Jaime Michel telling striking employees they would lose their jobs if they did not return to work and by offering them more money to do so; and by its supervisor, T. Gabriel, threatening to and firing in fact a striking employee.
5. The strike against Respondent was converted to an unfair labor practice strike on or about December 6 or 7. By failing and refusing to reinstate unfair labor practice strikers who had not been permanently replaced as of December 6 or 7, and who made unconditional offers to return to work, Respondent violated Section 8(a)(3) and (1) of the Act.
6. By the aforesaid conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have found that the economic strike that began on December 2, 1997, was converted to an unfair labor practice strike on December 6 or 7, 1997. I have further found that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate unfair labor practice strikers who were not offered reinstatement, and who were not permanently replaced before December 6 or 7, 1997, I shall recommend that Respondent be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after December 6 or 7, 1997. If, after such dismissals, there are insufficient positions available for the remaining former strikers, those positions which are available shall be distributed among them without discrimination because of their union membership or activities or participation in the strike, in accordance with seniority or other nondiscriminatory practice utilized by the Respondent. The remaining former strikers who were not replaced prior to the conversion, as well as those former strikers who were permanently replaced prior to the conversion, for whom no employment is immediately available, shall be placed on a preferential hiring list in accordance with seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements.

The employees entitled to immediate reinstatement, as well as those unfair labor practice strikers who made unconditional offers to return to work and were offered reinstatement by the Respondent, shall be made whole for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them in accordance with their unconditional requests to be reinstated. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, Respondent shall be ordered to post a notice setting forth its obligations herein.

ORDER

The Respondent, Heritage Container, Inc., Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Steel, Paper House, Chemical Drivers & Helpers Local 578, International Brotherhood of Teamsters, AFL–CIO or any other labor organization, by failing and refusing to reinstate unfair labor practice strikers on their unconditional offers to return to work who were not permanently replaced prior to the strike's conversion from an economic strike.

(b) Directly dealing with striking employees.

(c) Threatening striking employees with job loss if they did not return to work and offering them higher wages to do so.

(d) Threatening striking employees with discharge for being on strike and firing a striker in fact for striking.

(e) Withdrawing recognition from the Union in the absence of a bona fide doubt of the Union's majority status.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer all employees who were not offered reinstatement and were not permanently replaced prior to December 6 or 7, 1997, full and immediate reinstatement to their former jobs or, if those no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary, any replacements hired on or after December 6 or 7, 1997.

(b) Place any remaining former strikers, who were not replaced prior to December 6 or 7, 1997, as well as any former

strikers who were replaced prior to December 6 or 7, for whom no employment is immediately available, on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent and offer them employment before any other persons are hired or on the departure of any replacements hired before December 6 or 7, 1997.

(c) Make whole all unfair labor practice strikers to whom the Respondent failed to offer reinstatement on their unconditional offer to return to work, for any loss of earnings which they may have suffered, in the manner set forth in the remedy section of this decision.

(d) On request, recognize and bargain with Steel, Paper House, Chemical Drivers and Helpers Local 578, International Brotherhood of Teasters, AFL–CIO as the exclusive collective-bargaining representative of the unit employees, and if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees employed by Respondent at its facility located at 4777 Felspar Street, Riverside, California; excluding all office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board and its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, including an electronic copy of the records if stored in electronic form, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Riverside, California facility, copies of the attached notice, marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since December 3, 1997.

(g) Within 21 days after service by Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."